IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 16TH DAY OF APRIL 1998

BEFORE

THE HON'BLE MR.JUSTICE H.N. NARAYAN

CIVIL REVISION PETITION NO.3297 OF 1997

Between

1. Sri Marankaiah, s/o Sri Jayarayegowda, aged about 40 years, R/o Malagaranahalli village.

2. Smt.Muddamma, w/o late Sothegowda, Hindi, major, R/o Ajjahalli village, Malagaranahalli post, Maddur Taluk, Mandya District.

..Petitioners

(By Sri R.A.Devanand, Adv.)

And

Sri Raju, S/o Gummiah, R/o Annahalli village, Malagarana-halli Post, Maddur Taluk, Mandya District.

..Respondent

(By Sri B.M.Krishna Bhat, Adv.)

This revision is filed under Section 115 CPC against the order dt.30.9.1997 passed in O.S.No.66 of 1997 on the file of the Addl. Civil Judge (Jr.Dn.) Maddur, answering issue Nos.3 and 4 in the affirmative.

This petition having been reserved, the Court made the following:

O R D E R

This revision is directed against the order of the trial Court answering preliminary issues 3 and

that the trial Court has erred in holding that S.91 CPC is attracted to the case on hand even though the suit property is not a public road and no question of public nuisance arises. It is his further contention that the trial Court has also erred in holding that the plaintiffs ought to have filed a suit atleast under O.1 R.8 CPC. It is his contention that Section 91 CPC is a substantial law whereas O.1 R.8 contemplated under CPC is a procedural law. Section 91 is not inter-dependant nor inter-related nor co-exists with the provisions of O.1 R.8 CPC.

3. Insofar as the first contention is concerned, the learned counsel has relied on a ruling of this Court in MONNAPPA VS. CHIEF SECRETARY, GOVT.OF KARNATAKA AND ANOTHER (1977(2) KLJ 368). It is laid down therein that Order 1, Rule 8, CPC applies only to case in which many persons are jointly interested in obtaining relief, andnot to case in which individual rights have been violated. The rules does not debar a person from maintaining a suit in his own right in respect of a wrong done to him, though the act complained of may also be injurious to others.

4. The ruling of this Court in MUTTAMMA's case is clearly an answer to the contention that the suit ought to have been filed u/o 1 R.8 CPC. This is so apecially where the plaintiffs have got their own interest in the relief claimed apart from the rights of other persons who have similar rights in the said property.

5.Sofar as the other contention that S.91 CPC is also attracted to this case, I may point out having regard to the context of the facts of the present case wherein the plaintiffs sought redressal of alleged individual ground, therefore it is not a case where the wrongful act affect the public in general as only a few people claimed rights in the use of the road as according to the plaintiffs they have formed the said road for their own exclusive use.

6. Two other contentions are raised in this revision viz., the revision does not lie under Section 115 CPC where issue involving question of jurisdiction are decided but no decree has been drawn up. Learned counsel for the petitioners has relied on two decisions of this Court reported in

SMT.CHANABASAWWA AND ANOTHER VS. BHIMAPPA RAMAPPA HOSMANI AND OTHERS (AIR 1975 Karnataka, 15) and A.V. IBRAHIM AND ANOTHER VS. MANDEPANDA CARIAPPA (AIR 1971 Mysore, 298). The Division Bench of this Court in SMT.CHANABASAWWA's case has stated that the powers of revision under Section 115 of the Code is discretionary, but where there is a conscious violation of a rule of law or procedure on the part of the subordinate Court, the High Court has got that discretionary power under Section 115 CPC to reverse the order. The powers of the High Court under Section 115 CPC are specified therein, but what concerns the Court while exercising the power under Section 115 CPC is that if the order were to be allowed to stand, would occasion failure of justice or cause irreperable injury to the party against whom it was made, the High Court has necessarily to revise the order. But the prescise question raised is not with reference to the jurisdiction of the Court under Section 115 CPC but the jurisdiction of the Court specially where a suit is dismissed on preliminary issues and whether it amounts to a decree and appealable.

7. Sri Krishna Bhat - learned counsel for the respondent has relied on a decision of this Court in MUTTAMMA's case wherein it is held that the suit has been finally disposed of on the finding of this preliminary issue of law as provided under Order XIV, Rule 2(2)(b), CPC which amounts to a decree. Reliance is placed by this Court in the said decision to the Supreme Court judgment in GANGA BAI VS. VIJAY KUMAR (AIR 1974 S.C.1126) wherein the Supreme Court has pointed out that under the CPC., an appeal lies only as against a decree or as against an order passed under Rules from which an appeal is expressly allowed by Order 43, R.1. No appeal can lie against a mere finding for the simple reason if the Code does not provide for any such appeal. The learned Single Judge has also relied on the decision of this Court in HONNAYYA VS. YELLAWWA (1979 (2) KLJ 34). The learned Single Judge has distinguished HONNAIAH's case having regard to the facts set out in the said case and held that since the trial Court has decided the suit itself on the preliminary issue of law as provided under O.14 R.2(2)(b) CPC and found that the suit itself is not maintainable and the suit has been finally disposed of on the finding of

this issue dismissal of suit amounts to the decree and the learned Civil Judge went wrong in holding that no appeal lies against the order passed by the trial Court forgetting that the order amounts to a decree.

8. The question raised for consideration really needs elaborate and careful consideration as on careful perusal of the citations placed before me, I find that no universal law is laid down in those decisions having regard to the questions of law raised in this revision.

9. In HONNAIAH's case the suit for permanent injunction was dismissed solely on the ground that the plaintiff failed to prove interference on the part of the defendant though the Court answered the first issue regarding lawful possession in the affirmative. The learned Judge relying upon the decision of the Supreme Court in SMT. GANGH BAI's case however was of the opinion that a finding on issue even if it is against the defendant would not amount to a decree so as to be appellable. In other words, a dismissal of the suit answering the

finding in the negative is not decree at all. It is this opinion which is distinguished in MUTTAMMA's case. In A.V. IBRAHIM AND ANOTHER's case, the facts before the Division Bench were that there was an eviction suit pending before the Appellate Court when the Mysore Rent Control Act of 1961 were made applicable to the area in which the premises were leased out. The defendants filed an amendment application to take up a new plea regarding the jurisdiction which was allowed. An issue of jurisdiction was raised to try the suit. The issue was answered in the affirmative which order was impugned in the revision before the High Court. The matter was referred by the learned Singl Judge to be decided by the Bench as they involved substantial question of law. Relying upon the ruling of the Supreme Court in S.S. KHANNA VS. F.J DILLON(AIR 1964 S.C.497), the Division Bench of this Court has stated as follows:

> "It is to be seen in these cases, that the trial court has held that it has jurisdiction to try the suits. But since the other issues have not been disposedof, no decree has been passed in these suits one way or the

the other. Hence, the petitioners were unable to take up the matters in appeal. We feel therefore in view of what the Supreme Court has stated that in cases of the type we have before us where issues which involve question of jurisdiction are disposed of and no decree has been drawn up, a revision petition would lie to the High Court against the findings on such issues under Section 115 of the Code of Civil Procedure."

10. Now referring to the two judgments of the Supreme Court which are relevant wherein this Court has relied on the cases cited supra. The facts involved in these cases are really relevant which ultimately persuaded the Supreme Court to laid down the law on the question. S.S.KHANNA's case was a case of partnership business wherein the partners agreed to dissolve the partnership. Since disputes arose after dissolution and there was a suit for recovery of certain amount with interest. The trial Court framed an issue regarding maintainability of the suit in the light of the

defence pleaded in the written statement. That issue was tried as a preliminary issue and it was held that the suit was not maintainable. The said order was impugned before the Punjab High Court and the Punjab High Court in exercise of its revisional jurisdiction set aside the order and directed the suit to be heard and disposed of according to law. The order of the High Court was taken in an appeal with Special Leave before the Supreme Court. The jursisdiction of the High Court was challenged on 3 counts.

(i) that the order did not amount to "a case which has been decided" within the meaning of S.115 of Code of civil Procedure;

(ii) that the decree which may be passed in the suit being subject to appeal to the High Court, the power of the High Court was by the express terms of S.115 excluded; and

(iii) that the order did not fall within any of the three clauses (a), (b) and)c) of S.115.

After elaborate discussion on the question, the Supreme Court at para 14 held as follows:

"The subordinate Judge in the present case held by an interlocutory order that the suit filed by Dillon for recovery of the amounts advanced to Khanna was not maintainable. That was manifestly a decision having a direct bearing on the rights of Dillon to a decree for recovery of the loan alleged to have been advanced by him, which he says Khanna agreed to repay, and if the expression "case" includes a part of the case, the order of the subordinate Judge must be regarded as a "case which has been decided".

11. The Supreme Court while considering the scope of Section 115 CPC with reference to the Rajasthan High Court 's decision in SWARUPNARAIN VS. GOPINATH (AIR 1953 Rajasthan, 137) held there is an attempt to stretch the jurisdiction of the High Court even to matter which fall within the category of an appeal from the final orders passed in the

suit. The relevant opinion of the Supreme Court is found in paras 13, 16 and 17 of the judgment in the following words:

> 13. "That is not to say that the High Court is obliged to exercise its jurisdiction when a case is decided by a subordinate Court and the conditions in cls.(a), (b), or (c) are satisfied. High Court is not bound to interfere merely because the conditions are satisfied. The interlocutory character of the order, the existence of another remedy to an aggrieved party by way of an appeal, from the ultimate order or decree in the proceeding or by a suit, and the general equities of the case being served by the order made are all matters to be taken into account in considering whether the High Court, even in cases where the conditions which attract the jurisdiction exist, should exercise its jurisdiction."

16. "In considering whether the revisional jurisdiction of the High Court was intended to cover decisions, which did not dispose of the suit or proceeding, possibility of delay arising in the disposal of some cases because of investigation commenced by the High Court is not, in our judgment, a sound ground for presuming that the jurisdiction was to be limited to those matters which were finally disposed of."

17."For the effective exercise of its super-intending and visitorial powers, revisional jurisdiction is conferred upon the High Court to restrict it to those case only where no appeal would reach the High Court from the final order passed in the proceeding. We are therefore unable to agree with the view which prevailed with the Rajasthan High Court that there is a restriction placed upon the power of the High Court in the exercise of the revisitional jurisdiction as would limit the exercise of

that power only to cases where no appeal is competent from the final order passed in the suit or proceeding."

Referring to the third question which relates to the issue of jurisdiction decided by the trial Court, it is held that:

"In any event the decision of the Court clearly attracted cl.(c) of S.115 Code of Civil Procedure, for the Court in deciding that "the suit was not maintainable as alleged in paragraphs 15, 16, 17 and 18 of the written statement" purported to decide what in substance was an issue of fact without a trial of the suit on evidence."

It is observed at para 19 as follows:

"We are at this stage not expressing any opinion on the question whether the allegations made by Dilon and Khanna are true: we are only concerned to point out that what was regarded as an issue of law as to maintainability of the suit could only be determined after several questions of

fact in dispute between the parties were determined. In proceeding to decide the third issue merely on the pleadings and on the assumption that the allegations made by the defendant in his written statement were true and those made by the plaintiff were not true, and on that footing treating the joint account as of the common ownership of the two partners, the Trial Judge acted illegally and with material irregularity in the exercise of his jurisdiction."

Therefore, in this case the Supreme Court is particularly of the view that though the trial Court has framed a preliminary issue, it decided on the premise that it is an issue of law erroneously and such a finding was without jurisdiction resulting in material irregularity as the trial Court ought to have decided the said issue after recording evidence as it was a mixed question of fact and law. It is very pertinent at this stage to refer to the decision of the Supreme Court in GANGA BAI VS. VIJAY KUMAR, sofar as this aspect is concerned which clearly deals with the right of